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Supreme Court of the United States

OCTOBER TERM, 1927.

No. 170.

FINANCE AND GUARANTY COMPANY,
PETITIONER,

vs.

HENRY W. OPPENHIMER, TRUSTEE IN BANKRUPTCY FOR W. A. LEE, TRADING AS NATIONAL MOTOR COMPANY, BANKRUPT, RESPONDENT.

BRIEF FOR RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

J. VAUGHAN GARY, and
JOSEPH M. HUBY, JR.,
Richmond, Virginia,
Counsel for Respondent.

(32,425)

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BRIEF FOR RESPONDENT.

Before going into a discussion of the main questions presented in this case we desire to call the attention of this Honorable Court to an item of $700.00 and interest, as to which we understand there is no controversy, this item being for certain extra equipment on the automobiles which are the subject of this suit.

The four Velie automobiles, which are the subject matter of this litigation, and which were claimed by the

Petitioner, Finance and Guaranty Company, when first bought by the Bankrupt and when the titles thereto were reserved by the Petitioner, did not have placed thereon certain extra equipment, and the Petitioner never had any lien on this equipment or any claim thereto.

The uncontradicted testimony of the wife of the Bankrupt in this connection is as follows:

> "That the four Velie cars were touring cars, one a model 48 and three model 34, the 34's selling at around $1,385.00 f. o. b. factory, and the 48 at between $1,500.00 and $1,800.00 f. o. b. factory, this being the price without extra equipment, such being the condition of the cars when the liens of defendant were put on the cars; that afterwards the model 48 was fully equipped with every extra equipment that could be put on an automobile and the other cars had extra equipment such as bumpers and pilot lights, and that the value of the extra equipment was between $800.00 and $1,000.00." (R., 25.)

When, however, the Petitioner repossessed the four automobiles they repossessed the automobiles along with the extra equipment placed thereon and the automobiles and this extra equipment were sold by them.

When the case was first tried in the District Court, Judge Groner decided against the Trustee in Bankruptcy with respect to the four automobiles, but allowed the Trustee in Bankruptcy to recover for the value of this extra equipment, that portion of the order being as follows: (R., 14.)

> "This day came the parties in the above action, by their attorneys, and by agreement of parties, trial by jury was waived, and all matters of law and fact are submitted to the Court, and the Court having fully heard the evidence, doth consider that the plaintiff recover of the defendant the sum of $700.00 and one-half of his costs herein, and no more."

The order of the District Court directing the entry of this judgment is as follows: (R., 15.)

> "The claim for extra equipment, I think should be allowed. This extra equipment, according to the evidence, was all placed on the cars after the conditional sales contracts were executed and recorded. The amount which is chargeable to this item is stated in the evidence at from $700.00 to $1,000.00. It was not itemized and it is doubtful whether the amount is exactly correct, and yet it is all the evidence that was before me on the subject. The case was regularly tried and I know of no good reason to re-open it and re try this question. The Clerk will, therefore, enter judgment for the plaintiff for seven hundred dollars ($700.00) and costs divided."

The Trustee in Bankruptcy sued out a writ of error from this judgment to the Circuit Court of Appeals for the Fourth Circuit for the reason that the decision was against him as to the four automobiles, and the Finance and Guaranty Company has never assigned error or objected to the $700.00 allowed the Trustee in Bankruptcy for this extra equipment. Consequently, therefore, regardless of the decision of this Honorable Court as to the merits of the main controversy, we respectfully submit that any decision should provide for this amount of $700.00 for the extra equipment, and it is our understanding that the Finance and Guaranty Company does not deny this claim.

Since these automobiles, together with the extra equipment, were repossessed on January 10, 1922, the conversion of the extra equipment took place on that day, and interest on the $700.00 should be allowed from January 10, 1922.

In Cooley on Torts (Student's Ed.), page 420, it is said:

"Any distinct act of dominion wrongfully exerted over one's property in denial of his rights, or inconsistent with it, is a conversion."

In 26 Ruling Case Law, page 1120, it is said:

"The rule is well settled that the wrongful seizure of the property of one person under legal process directed against another amounts to a conversion, for which an action of *trover* may be maintained against the officer who makes the seizure or against the person who directed the officer to act."

In Burk's Pleading and Practice, Section 166, which is the standard book on the subject in Virginia, Judge Martin P. Burks, now on the Supreme Court of Appeals of Virginia, being the author, it is said:

"Any appropriation of property in disregard or defiance of the owner's rights in it will amount to a conversion and this conversion may be proved in three ways: (1) By a tortious taking; (2) by any use or appropriation to the use of the person in possession, indicating a claim of right in opposition to the rights of the owner; (3) by refusal to give up the possession to the owner on demand. In the last case the possession may have been in the first instance lawful, but ceases to be lawful upon refusal to deliver to the owner on demand."

In Section 169 this author says:

"As a general rule, the measure of damages where the conversion is complete is the value of the property converted at the time of the conversion, with interest thereon from that date."

In *Cecil* v. *Clarke*, 49 W. Va. 459, it is said:

"The measure of damages in *trover* is the value of the property and interest thereon from the time of conversion."

What we have said above, however, is not to be construed as in any way waiving our claim as to the full value of the four automobiles so repossessed by the Finance and Guaranty Company.

FACTS.

The facts in this case are so clearly and succinctly stated by the late Judge Rose in his opinion in this case that we would not attempt to improve on his language. After stating that he will for the sake of brevity refer to the Trustee in Bankruptcy as the Trustee and to the Finance and Guaranty Company as the Vendor, he makes the following terse statement of this case (R., 17; see also 5 Fed. (2nd), p. 486):

> "The bankrupt, one W. A. Lee, traded as the National Motor Company. No one else was interested in the business which was that of buying and selling automobiles. The Vendor financed the purchase of automobiles for Lee and was the vendor of the cars to him. The sale was made on the instalment plan and by the agreements between the parties, which were duly recorded, the legal and equitable title to the automobiles was to remain in the Vendor until the final payment of the last instalment of the purchase money and the performance by the bankrupt of the other terms of the agreement. These contracts contained other provisions, such as that the bankrupt could not mortgage, rent, pawn, dispose of, or sell, the property, without the permission of the Vendor, first obtained in writing. There is no question, however, that the bankrupt bought the automobiles to sell again and that the Vendor was at all times aware of this intention. The agreements, all substantially identical in form, bore date at various times from the 28th of April, 1921, to the 6th of August, in the same year.
>
> On the 26th of December, 1921, Lee left Richmond, for parts unknown and so far as the record discloses, has not been heard of since. On the 10th

of January, the Vendor instituted suit in *detinue* in the law and equity court of the City of Richmond and in the initial affidavit, its duly authorized agents swore that there was good reason to believe that Lee was insolvent. In execution of the writ issued in the case, the sheriff of Richmond on the same day seized the automobiles and delivered them to the Vendor. Ten days later, on the 20th of January, an involuntary petition in bankruptcy was filed against Lee and he was on the 25th of February adjudicated a bankrupt.

On the 15th of December, 1922, the Trustee filed a petition in the instant proceedings against the Vendor alleging that the taking and possession by it of the four automobiles in question amounted to a voidable preference and praying an order for the return of the automobiles or the payment of the money value thereof."

The statement in the brief of counsel for the petitioner, on page 4 thereof, and the opinions of the District Court for the Eastern District of Virginia, and of the Circuit Court of Appeals for the Fourth Circuit, copied in the printed record, correctly set forth the previous course of this litigation. The opinion of the Circuit Court of Appeals for the Fourth Circuit, delivered by Judge Rose with his usual force and clarity (R., 17, also 5 Fed. (2nd), p. 486), is in effect the decision of the merits of this case and is the decision from which the Petitioner is appealing.

ARGUMENT.

At the very threshold of our argument we want to say that our case rests entirely and solely on Section 5224 of the Code of Virginia (1919) commonly known as the "Traders' Act", taken in connection with the Bankruptcy Act, and without this section of the Code of Virginia it would have been useless to institute this suit. Our position is that the repossession of these four au-

tomobiles by the Petitioner in view of the Virginia "Traders' Act" constituted a voidable preference in bankruptcy, and the suit was instituted by the Trustee in Bankruptcy in order to set aside this voidable preference.

On account of a typographical error in the brief of counsel for the Petitioner in quoting this statute, it is set forth here, being as follows.

> "IF A FACTOR, AGENT, ETC., WHO IS A TRADER, FAIL TO DISCLOSE NAME OF PRINCIPAL OR PARTNER, OR DO BUSINESS IN HIS OWN NAME, PROPERTY USED IN SUCH BUSINESS LIABLE FOR HIS DEBTS: EXCEPTION.
>
> If any person transact business as a trader, with the addition of the words 'factor', 'agent', 'and company', or 'and Co.', and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house wherein such business is transacted, and also by a notice published for two weeks in a newspaper (if any) printed in the city, town, or county wherein the same is transacted; or if any person transact such business in his own name, without any such addition; all the property, stock, and choses in action acquired or used in such business shall, as to the creditors of any such person, be liable for the debts of such person. This section shall not apply to a person transacting such business under a license to him as an auctioneer or commission merchant."

This Statute has been on the statute books of Virginia since 1839. It has been copied almost verbatim in the Codes of West Virginia and Mississippi, but with these two exceptions we know of no State in the Union which has any provision of law which is anyway similar to it. It has been construed many times by the Supreme Court of Appeals of Virginia (the court of last resort in that State), and also by the United States District Courts

in Virginia and the Circuit Court of Appeals for the Fourth Circuit. As a result of these decisions the purpose and meaning of the statute have become well established and business has adapted itself to it.

THE TRUE NATURE OF THE VIRGINIA "TRADERS ACT".

The practical effect of the statute, as construed by the Virginia Courts, is that so far as creditors of the trader are concerned, the property is to all intents and purposes the property of the trader. As between creditors of the trader and the actual owner of the goods, the actual owner is estopped from claiming the goods and is estopped from denying that they are the property of the trader.

In *Hope* v. *Turner*, 96 Va. 624, it is said:

> "The purpose of the Legislature in enacting the statute, as the title of the original act passed March 28, 1879, shows, was to prevent persons carrying on business under false or fictitious names and firms. The object was to prevent fraud; to compel any person transacting business as a trader to disclose the name of the real owner of the business, if any other there be; to prevent any shifting or evasion of ownership and liability for debts in case of controversy; and to preclude the assertion of secret claims of ownership against creditors of him who has conducted the business, possessed the property, and appeared to be its owner.
>
> The language of the statute is plain, explicit, and imperative. It leaves no room for exception or qualification. If any person, as is alleged in this case, transact business as a trader in his own name with the addition of the word 'Agent', or in his own name, without such addition, and fail to comply with the provisions of the statute, it makes all the property, stock, and choses in action acquired or used in such business absolutely liable for his debts,

whether contracted in the particular business or not, and without regard to knowledge by the creditor of the principal, if principal there be. Knowledge, or want of knowledge, plays no part in the application of the statute. That is an immaterial matter. The only question is whether the person was doing business as a trader within the meaning of the statute, and has complied or failed to comply with its positive requirements."

In *Chesapeake Shoe Co.* v. *Selsnor*, 122 Fed. 593, the first case decided by the Circuit Court of Appeals for the Fourth Circuit which construes and applies this statute in a case of bankruptcy, Judge McDowell thus states the intent of the statute:

"The Virginia Statute does not in express terms declare that the title of goods consigned to the trader doing business in his own name, shall be vested in the trader. But its intent is clearly to make such goods the property of the trader quoad his creditors."

. . . . .

"To all intents and purposes, so far as his creditors' rights are concerned, this statute vests in the trader the title to the consigned goods. It precludes the assertion of secret claims of ownership by the consignor. In other words, it avoids the title of the consignor and gives title to the trader."

This case has been frequently cited and approved by the Virginia Court.

In *Nusbaum, Trustee in Bankruptcy*, v. *City Bank and Trust Company*, 132 Va. 54, it is said:

"Such property, being liable under the Virginia Statute, is quoad his creditors like the other property of the trader to which he has absolute title,

and hence in case of bankruptcy constitutes assets for distribution to his creditors."

In his opinion in the instant case, after a full review of the Virginia decisions, Judge Rose thus states the effect of the statute:

"Fifth, that goods in the possession of a merchant under the circumstances above stated are quoad his creditors his property."

In view of these cases construing the statute, therefore, we believe that there can be no question that so far as creditors of the trader are concerned, the goods are to all intents and purposes the property of the trader, and that when we come to consider any particular case, the true test is, would the transaction questioned be allowed to stand if the goods belonged in fact to the trader. If the transaction could be attacked were the goods in point of fact the goods of the trader, then it can also be attacked if the goods are used by the trader in his business and are thereby by the statute made his in contemplation of law.

In *Edmunds* v. *Hobbie Piano Co.*, 97 Va. 588, the trader was a corporation engaged in buying and selling musical instruments, and some pianos and organs which the trader had in its possession on consignment contracts were levied on by general creditors. The Court held that the title of the creditors was superior to that of the consignor.

In *Partlow* v. *Lickliter*, 101 Va. 631, one William F. Lickliter was in business as a merchant and was largely indebted to Fannie L. Partlow, and in order to secure her or to pay the debt, he executed to her a Bill of Sale which was duly recorded, but he continued to conduct the business in his own name. Thereafter he confessed judgment in favor of Ella F. Lickliter, and the City

Sergeant thereupon levied on the personal property used in the business. In the interpleader proceedings it was held that the title of the judgment creditor was superior to that of the person holding the recorded Bill of Sale.

In the case last mentioned the Court held that the recordation of the lien was immaterial. This holding was incorporated into the Virginia Code of 1919, by an amendment to Section 5194, this being the section dealing with the recordation of instruments, the amendment being as follows:

> "A recordation under this section shall not affect the rights of a creditor acquired under section fifty-two hundred and twenty-four."

The Code Revisors, in their notes to this section, say:

> "The last sentence is new and makes statutory the decision in *Partlow* v. *Lickliter*, 100 Va. 631."

In the case of *Chesapeake Shoe Co.* v. *Seldner*, 122 Fed. 593, the facts are that Small, a retail shoe dealer, was adjudicated a bankrupt and there came into the possession of his trustee in bankruptcy a certain quantity of shoes which had been sent Small on consignment by the Chesapeake Shoe Co. The Chesapeake Shoe Co. claimed these shoes, but the Referee, to whom the matter was referred, reported adversely to this claim, holding that under the Virginia "Traders' Act" the property became liable to the bankrupt's creditors. This holding was sustained by the District Court and also by the Circuit Court of Appeals for the Fourth Circuit.

In the case of *Virginia Book Co.* v. *Sites*, 254 Fed. 46, decided by the Circuit Court of Appeals for the Fourth Circuit, in 1918, the facts are that one Magee

was a bookseller at Salem, Va., and was the local agent for the Virginia Book Co., selling for it books consigned to him. He filed his voluntary petition in bankruptcy, but two days before his petition was filed and when the Virginia Book Co. had reason to believe he was insolvent, said Book Company repossessed such of its books as Magee had on hand. Upon petition of the Trustee, the Referee ordered a return of the books, which on appeal was upheld by the District Court and also by the Circuit Court of Appeals.

ANSWER TO THE ERRORS ASSIGNED BY THE PETITIONER.

As we understand from the petition for the Writ of *Certiorari* filed in this case, and the brief of counsel for the Petitioner, the contention of counsel for the Petitioner is that the decision of the Circuit Court of Appeals was erroneous in three respects, namely:

1. That the rights of the Trustee in Bankruptcy are fixed as of the date of the filing of the petition in bankruptcy.

2. That the Virginia decisions have no application to property recaptured and is for the protection of lien creditors only.

3. That the decision is at variance with the decisions in the other circuits of the Circuit Courts of Appeals.

THE NUSBAUM CASE.

Fortunately for a correct decision of this question, we confidently submit that the first two of these points have been finally and absolutely disposed of by the Supreme Court of Appeals of Virginia (the Court of last resort in that State), in the recent case of *Nusbaum*,

Trustee in Bankruptcy v. *City Bank and Trust Company*, 132 Va. 54, which case incidentally has nowhere been mentioned by counsel for the Petitioner. The opinion was written by Judge Prentis, now President of the Court.

The facts in the case are thus stated by Judge Prentis:

> "The plaintiff, Bertram S. Nusbaum, Trustee in Bankruptcy for Gatewood and Steinbaugh, Inc., filed his motion against the City Bank and Trust Company, alleging that there had been illegal transfer within the four months preceding the filing of the petition in bankruptcy, whereby the bank, as creditor of the bankrupt, had obtained a greater percentage of its debt than any other creditor of the same class, and that when the transfer was made, the creditor had reasonable cause to believe that such transfer would result in such a preference. There was a jury trial and a verdict in favor of the plaintiff, which the judge of the trial court set aside as contrary to the law and the evidence, and thereupon entered judgment in favor of the defendant, which is here for review.
>
> The pertinent facts as to which there is no conflict are these: The bankrupt corporation filed its petition October 14, 1919, and was subsequently adjudicated a bankrupt. It was engaged as a trader in buying and selling automobile accessories and supplies and in repairing such vehicles, and transacted all of its business in its corporate name, Gatewood and Steinbaugh, Inc. It had ordered thirty automobile trucks from Larrabee-Deyo Motor Truck Company, Inc., under a conditional sale contract, to be delivered at stated intervals, for resale, which contract was never recorded. Only one of these trucks appears to have been delivered, and the agreement with reference thereto appears to have been subsequently changed, and thereafter, on October 1, 1919, it was agreed that this truck should be held under a consignment contract with the power to the consignee to sell and obligation to account for

the proceeds thereof to the consignor, Larrabee-Deyo Motor Truck Company, Inc. This contract was never recorded. R. A. Williams, Secretary of the bankrupt corporation, a few days after the date of this consignment contract, stored the truck in his own name with the Southgate Terminal Corporation on October 3, sold it October 8, for $2,350.00, and paid the bank $2,250.00 in settlement of five notes of the corporation, of which only $808.08 was then due, the said Williams at the time being liable therefor as endorser; the effect of which was to enable the bank to obtain a greater percentage of its debt than any other creditor of the same class."

Continuing, Judge Prentis says:

"In the administration of the bankruptcy law, it is perfectly well settled that the State statutes enacted for the protection of creditors are given full force and effect, so far as they are not in conflict with the bankrupt law. It follows, therefore, that a preference or transfer may be unlawful or fraudulent under the statutes of one State which, under identical circumstances, would be held valid in another State. In most of the States, in the absence of a controlling statute, where there is such a bailment as here appears, the title of the bailor is superior to that of the trustee in bankruptcy who takes no title thereto, even if in the bankrupt's possession at the time of his appointment, and the trustee could not set aside a transfer thereof by the bankrupt in anticipation of bankruptcy."

Judge Prentis then reviews the cases of *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, and *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268, so strongly relied on by Counsel for the Petitioner, showing how those decisions are not applicable to or in any way at variance with the situation which exists in Virginia on account of the unique "Traders' Act", found nowhere else except West Virginia and Mississippi, and thus states the real question at issue:

"The determination of the precise question here involved depends upon whether or not the automobile truck and its proceeds were assets in the possession of the bankrupt which could have been subjected by its general creditors, and its liability to be thus subjected depends upon whether or not the automobile and the proceeds arising from its sale were acquired by the bankrupt as a trader within the meaning of the Virginia traders' act. (Code 1919, Sec. 5224.)"

He then reviews the Virginia cases above mentioned and also the Federal cases of *Chesapeake Shoe Co.* v. *Soldiner* and *Virginia Book Co.* v. *Sites*, above referred to, and concludes as follows:

"Unless this line of cases is to be repudiated, it seems clear to us that the trial court erred in setting aside the verdict. The main purpose of the bankrupt act is to enforce equality as between the creditors of the same class, and hence it avoids all preferences made within the four months preceding the filing of the petition in bankruptcy. It is perfectly clear from the authorities that if the automobile truck had not been sold at the time the petition was filed, it would have constituted a part of the assets of the bankrupt for distribution among its creditors. It is also clear that if the proceeds of such sale had been held by the bankrupt at that time they would have passed as a part of his assets to the trustee in bankruptcy. It seems to us to follow logically and inevitably that as either the property or the proceeds arising from its sale could have been subjected by the general creditors to their debts under the Virginia statute, so the disposition thereof by the bankrupt for the benefit of one creditor in diminution of the assets to which all the creditors could have resorted, is clearly within the inhibition of the bankrupt act. Such property, being liable under the Virginia statute, is quoad his creditors like the other property of the trader to which he has absolute title, and hence in case of bankruptcy constitutes assets for distribution to his creditors.

> If we considered the question an open one, we might elaborate the reasons for this conclusion, but following the cases which we have cited, we regard it as closed, and, however great the possible hardship may be in some instances, those who deal with merchants in Virginia should take notice of the Virginia traders' act and be observant of the risks they incur as well as of the advantage accruing thereunder."

In order for there to be no possible misunderstanding of the exact points involved in this case (*Nusbaum* case) we have examined the printed record and the briefs filed in the clerk's office of the Supreme Court of Appeals of Virginia. The following was the decision of the lower court which was under review, as stated in the printed record:

> "In this case it is attempted to hold the defendant for a voidable preference, because it received ten days before the bankrupt filed his petition in bankruptcy the proceeds of sale of a motor truck that was held by the bankrupt (or one of the partners) under consignment from Deyo, etc.
>
> It cannot be doubted that the truck was at first held under a conditional sale and afterwards was put on consignment.
>
> Ten days before the petition in bankruptcy was filed the truck was sold and the proceeds used to pay off notes of the bankrupt held by the defendant herein.
>
> The Trustee in Bankruptcy asserts that this constitutes a voidable preference and that in consequence judgment should be given in favor of the plaintiff.
>
> In order to constitute a voidable preference the property conveyed must be the property of the bankrupt, or as the Courts say the 'estate of the bankrupt must be diminished thereby'. So the real question to be solved is was the proceeds of the truck part of the estate of the bankrupt quoad the trustee in bankruptcy.

It is clear that under the express terms of 47-A (1910) said trustee 'shall be deemed vested with all the rights of a judgment creditor holding an execution duly returned unsatisfied'. So the inquiry is put back one step further, viz., what are the rights of a judgment creditor and where do those rights vest under 47-A?

The Supreme Court of the United States has answered this question in at least two cases, (*Acme Harvester Company* v. *Beckman*, 222 U. S., and *Bailey* v. *Baker and Company*, 239 U. S. 268). In this last case the Court says in discussing this question: 'That section (47-A 1910) provides that a trustee in bankruptcy, as to all property in custody, etc., * * * shall be deemed vested with * * * rights of creditor holding a lien. * * * Although otherwise explicit this provision does not designate the time as of which the trustee is to be regarded as having acquired the status indicated, and yet some point of time must be intended. When not otherwise especially provided, the rights, remedies and powers of the trustee are determined with reference to the condition existing at the time of the filing of the petition. * * * We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed, and that the property which vests in the Trustee at the time of the adjudication is that which the bankrupt owned at the time of the filing of the petition.'

Applying this rule we find the truck in question here and its proceeds had passed out of the possession of the petitioner in bankruptcy and so could not be subject to any claim even of a lien creditor who did not become vested with the rights of such a lien creditor until the said petition was filed.

For these reasons I adhere to my formerly expressed opinion and will overrule the motion to set aside the judgment heretofore entered in this case."

It will thus be seen that the lower court, upon the authority of *Bailey* v. *Baker Ice Machine Company*, 239 U. S. 268, held exactly what is so earnestly contended

for by Counsel for the Petitioner here, namely, that the line of cleavage is the condition of affairs when the petition is filed. In reversing this decision, Judge Prentis points out that the lower court did not take into consideration the true nature of the "Traders' Act" and the other applicable provisions of the Bankruptcy Act, his language being as follows:

> "The learned judge of the trial court appears to rest his judgment largely upon the language of Section 47 A of the Bankrupt Act, as amended in 1910 (U. S. Comp. St., Sec. 9631), where it is said that the trustee 'shall be deemed vested with all the rights of a judgment creditor holding an execution returned unsatisfied', as though that language and that section defined and limited all of the trustee's rights.
>
> There are, however, several other sections of the act which define the trustee's rights, duties and powers. He takes not only all of the rights of the bankrupt in his property, having power to set aside certain transactions, but he also succeeds to all of the rights of creditors of the bankrupt, including the right to set aside conveyances which bind the bankrupt, and takes title to certain property with which the bankrupt has voluntarily parted and could not reclaim. It is said in 2 Remington on Bankruptcy, page 943, that 'it is doubtless true that the trustee's title since the amendment of 1910, is the most extensive and complete of any in jurisprudence."

This case (*Nusbaum* case) is to all intents and purposes identical with the case at bar. Neither the motor truck nor the proceeds of the sale thereof was in the possession of the bankrupt at the time of the filing of the petition. By a coincidence, the truck had been sold and the proceeds thereof paid to the City Bank ten days prior to the filing of the petition, just as in this case the automobiles had been repossessed ten days prior to bankruptcy. Both the truck and the money were gone when

the petition was filed, and neither came into the possession of the trustee in bankruptcy.

Had the motor truck been the property of Gatewood and Steinbaugh, Inc., the payment to the bank would, of course, have been a voidable preference of the most ordinary sort. Had the automobile truck been the property of some one else and Gatewood and Steinbaugh, Inc., had wrongfully sold it and paid over the proceeds to the Bank, the money would have belonged to the true owner of the truck who could have recovered it from the Bank. It would not have been a preference which the trustee in bankruptcy could avoid, because the money never belonged to the bankrupt and his trustee had no interest in it. On well settled principles, a voidable preference must be a payment of funds belonging to the bankrupt or a transfer of the bankrupt's property, and not that of a third person. But in the *Nusbaum* case, we have a *tertium quid*, namely, a transfer by the bankrupt of property which is not his own in point of fact, but which the law in Virginia considers his *quoad* his creditors, which, liberally construed, means "which the law considers his so far as his creditors are concerned". When faced with this situation, the Supreme Court of Appeals of Virginia adheres to its previous rulings, namely, that to all intents and purposes it is the same as though the property were the trader's. Having sold such property and used the proceeds to pay his debts, the proceeds could be recovered by his trustee in bankruptcy.

It will be noted that in the *Nusbaum* case, the controversy was not between the true owner of the goods (the consignor) and the trustee in bankruptcy, but between another creditor who had been preferred and the trustee in bankruptcy. However, the court held that the proceeds of the sale of the truck belonged to the trustee in bankruptcy, and they certainly could not belong to both the trustee and to the consignor. Now had the consignor sued the Bank for the proceeds of the sale of the

truck, could it have recovered? Certainly not, because the Virginia Court held that the trustee in bankruptcy was the one entitled to the proceeds of sale.

Now suppose that instead of selling the truck and paying over the proceeds to the Bank, Gatewood and Steinbaugh, Inc., had delivered the truck itself to the Bank to be applied on its debt at an agreed price; or suppose that the truck had been delivered to the consignor or repossessed by it; would the decision of the Court have been any different? Obviously not. The decision rests entirely on the fact that as far as creditors are concerned, the property was in contemplation of law the property of the trader, and the consignor has no more right to it than any other creditor. When such property is sold and the proceeds of sale applied on a debt, the estate of the bankrupt (and not that of a third person) is diminished, because the property is in contemplation of law the property of the bankrupt.

We respectfully submit, therefore, that the property of the trader need not come into the possession of the trustee in bankruptcy in order for the trustee in bankruptcy to exercise the rights given creditors under the "Traders' Act". For that matter the very essence of a preference is that it is some payment or transfer made prior to bankruptcy—these are the only sort which it is necessary to vacate and set aside. When the property comes into the possession of the trustee in bankruptcy, there is ordinarily no need to vacate a preference, because there has been none. In the *Nusbaum* case the possession of neither the truck nor the money came into the hands of the trustee; both were gone when the petition was filed. The court bases its decision entirely upon the preference provisions of the bankruptcy act, and of course the very purpose of the preference provisions is to allow the trustee to set aside transactions which have taken place prior to bankruptcy.

Could there be any possible doubt as to what would

have been the decision of the Virginia Court had the consignor himself repossessed the consigned goods, it is set at rest by the fact that in his opinion Judge Prentis, in reviewing the previous authorities, devotes half a page to a statement of the facts and decision in *Virginia Book Co.* v. *Sites*, 254 Fed. 46, decided by the Circuit Court of Appeals for the Fourth Circuit in 1918. We cannot state this case better than is done by Judge Prentis in his reference to it. He says:

> "In the recent case of *Virginia Book Co.* v. *Sites*, 254 Fed. 46, this appears: The bankrupt trader had been for a year or more the local agent of the Virginia Book Company, at Salem, Va., for the sale on commission of school books, consigned to him under an unrecorded contract by which the legal title of the books remained in the book company. Two days before the petition in bankruptcy was filed, and when the book company had reasonable cause to believe that the trader was insolvent, it canceled his agency and repossessed itself of such of the books as he then had. Upon petition of the trustee in bankruptcy, it was held that by virtue of the traders' act and its construction by the Virginia courts, the trustee could recover, and that the return of the books to the consignor under such circumstances was a voidable preference under the bankrupt act."

There is not one word of dissent from this case and a reading of the context convinces one that the Virginia Court approved of it as correctly interpreting the "Traders' Act".

Counsel for the petitioner is therefore asking this Honorable Court to reverse and overrule the Circuit Court of Appeals not only in the case at bar but also he is asking that its decision of ten years ago in the *Sites* case (*supra*) be overruled, a decision which, until now, had been unquestioned, as far as we know, and which has been adopted by the bar and by business as establishing

On November 10th the other two cars were also seized by the sheriff and turned over to Capitol Motor Corp., along with the other six. White, Trustee, then filed his petition and became a party to the detinue proceedings which were already pending.

The decision of the Supreme Court of Appeals was that White, trustee under the assignment, was entitled to the two automobiles which were in the possession of Lasker at the time of the assignment, but that the consignor was entitled to the six which had been repossessed prior to that time.

The only question raised in the case which was new was whether a trustee under an assignment for the benefit of creditors took title to goods on consignment if the provisions of the "Traders' Act" were not complied with. This situation had never arisen before. Hitherto the controversy had been between creditors who had levied on the consigned goods and the consignor thereof, or between the trustee in bankruptcy of the trader, and the consignor.

The briefs in the case show that it was earnestly contended that a trustee in an assignment for the benefit of creditors is not a creditor or a purchaser for value, but stands only in the shoes of the assignor, and as such could not claim title to property to which the trader himself could not claim title. There were many previous decisions in Virginia which counsel claimed so held. The court decided otherwise, however, namely, that the trustee under the assignment was the representative of the creditors.

The only other point decided in the case was one which was obviously true, namely, that the trustee under an assignment takes only what the assigning debtor has, and that an assigning debtor cannot assign that which has already been taken away from him. Therein lies one of the main differences between the conventional trustee under an assignment, and a trustee in bankruptcy—the

former cannot vacate preferences, the latter can. A man may have a hundred creditors and pay ninety-nine of them in full one day and make an assignment the next day of what is left for the remaining one, and he cannot object. His only recourse is to bankruptcy proceedings, whereupon the whole picture changes.

Judge Rose makes the distinction perfectly plain in his opinion in the instant case when he says:

> "These propositions are decisive of the case. The fact that in *Capitol Motor Corporation* v. *Lasker*, 138 Va. 630, it was properly held that a trustee under a conventional assignment or a deed of trust for the benefit of creditors has no rights as against property of which the vendor or lienor repossessed himself before the delivery of the deed of trust or assignment, is in no wise in conflict with the law as it has been above stated. A conventional trustee has no power to vacate preferences."

That *Capitol Motor Corp.* v. *Lasker* does not in any way overrule *Nusbaum, Trustee in Bankruptcy*, v. *City Bank and Trust Company* (*supra*) or *Virginia Book Co.* v. *Sites* (*supra*), is shown conclusively by the fact that both cases are referred to with obvious approval in the opinion and there is a quotation of half a page from the *Nusbaum* case. The *Capitol Motor Corporation* case was decided only six years after the *Nusbaum* case, and at the time it was decided, Judge Prentis, who wrote the opinion in the *Nusbaum* case was, and still is, the President of the Court.

BAILEY v. *BAKER ICE MACHINE CO.*

Counsel for the Petitioner relies strongly on *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268. That was a case which arose under the recording law of Kansas, which provided that a conditional sale is void against a creditor

of the vendee who fastens a lien upon the property before the contract is filed for record. The contract was so filed for record prior to the filing of the petition in bankruptcy, but within four months of bankruptcy. This Honorable Court held three things:

1—That the contract was a conditional sale contract and not an absolute sale with a mortgage back, basing its decision on the construction put on such cases by the Kansas Courts.

2—That the recording was not a preference.

3—That the rights given a trustee in bankruptcy by Section 47 a of the Bankruptcy Act relate to the time of the filing of the petition.

The first of these points obviously has no application to the instant case.

The third has no application because we are not relying on §47 of the Bankrupt Act, but on the familiar preference provisions contained therein. As already stated, the lower court, in the *Nusbaum* case, decided the case on the strength of §47 a of the Bankruptcy Act. Judge Prentis reversed him, pointing out that the preference provisions were applicable and controlled the case.

Coming now to discuss the second point decided, we submit that the ordinary recording statutes are in no way similar to the Virginia "Traders' Act". We have in Virginia, just as in most states, a recording act similar to the Kansas statute, being found in §5189 and in §5194 of the Virginia Code (1919). The "Traders' Act" is, however, found in an entirely different chapter of our Code, and differs radically from ordinary recording acts. In so holding that the recording was not a preference, this Honorable Court points out that a pref-

erence must be a transfer of the bankrupt's estate and his estate must be diminished, saying:

> "Applying this test to the contract in question, we think it did not operate as a preferential transfer by Grant Brothers, the bankrupts. The property to which it related was not theirs, but the Baker Company's."

But under the interpretation put on the "Traders' Act" by the Virginia Courts the property is the property of the trader, in contemplation of law and by a legal fiction. The Virginia Court says so in case after case, and in the *Nusbaum* case it expressly so holds and allows the trustee in bankruptcy to vacate the preference for that very reason. The *Nusbaum* case was incorrectly decided unless we consider the automobile truck the property of the trader by a legal fiction—on no other grounds whatever could the trustee in bankruptcy be entitled to recover.

What we have said above also applies to *Firestone Tire and Rubber Co.* v. *Cross, Trustee*, extensively quoted from by counsel for the petitioner in his brief. That is a case dealing with ordinary recording statutes. It was decided by the Circuit Court of Appeals for the Fourth Circuit and certainly no attempt is made in it to overrule its previous decision in *Virginia Book Co.* v. *Sites* (*supra*), in which case, it will be recalled, the consignor repossessed the books from the consignee prior to bankruptcy.

The remaining error assigned by counsel for the petitioner is that the decision of the Circuit Court of Appeals in the case at bar, creates a conflict of decision in the several circuits of the Circuit Courts of Appeals.

In answer to this we believe it is necessary to say only that the Virginia "Traders' Act" is a unique and unusual provision of law, found nowhere else than in

West Virginia and Mississippi. Virginia and West Virginia are both in the same circuit, and so far as we can find the Federal courts have never construed the Mississippi statute in such a way as to conflict with the decisions in the Circuit Court of Appeals for the Fourth Circuit. To the contrary, we most earnestly submit that the principles in the case at bar have been decided ten years ago by the Circuit Court of Appeals for the Fourth Circuit in *Virginia Book Co. v. Sites* (*supra*), the exact point here involved being there decided, and also by the Virginia Court of last resort six years ago in the *Nusbaum* case, and that a reversal of those principles by this Honorable Court at this late date would work a hardship in cases already settled and in business transactions which have doubtless followed therefrom, and would create the greatest confusion.

CONCLUSION.

In conclusion, therefore, we respectfully submit:

1—That Sections 60 and 67 of the Bankruptcy Act authorize the Trustee in Bankruptcy to set aside conveyances or transfers of the bankrupt's property made either by the bankrupt or by his creditors by legal proceedings, within four months of bankruptcy, when the other well known essentials of a preference are present.

2—That the transfer must be of the bankrupt's property and not that of another.

3—That the Virginia Court has held time and time again that under the "Traders' Act", the property is in contemplation of law the property of the bankrupt.

4—That in *Virginia Book Co.* v. *Sites* (*supra*), which is absolutely identical with the case at bar, the Circuit Court of Appeals for the Fourth Circuit held that the repossession of the consigned goods by the consignor was a voidable preference in bankruptcy, and this decision has been approved by the Virginia Court as correctly interpreting the "Traders' Act".

5—That the *Nusbaum* case is in all essential respects identical with the case at bar.

6—That this Honorable Court is bound by the construction put upon this Virginia statute by the Virginia Court of last resort, and that a reversal of the Circuit Court of Appeals in the case at bar would violate this principle.

7—That under the Virginia decisions, when the rights of other creditors became involved, the Finance and Guaranty Company had no more right to the four Velie automobiles than any other creditor, and when it repossessed them the situation was in no wise different than it would have been had it secured a judgment and levied on or attached any other property of W. A. Lee.

For these reasons we respectfully submit that the decision of the Circuit Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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Counsel for Respondent.